Supreme Court, U.S.
FILED
NOV 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-361

In the Supreme Court of the United States

OCTOBER TERM, 1987

ALBERT SLUGOCKI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DAVID M. COHEN
ROBERT A. REUTERSHAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the court of appeals properly determined that the formula established by the Office of Personnel Management's predecessor for determining the Fair Labor Standards Act overtime pay rates for federal law enforcement officers complies with the requirements of that Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 81-98, modified, Pet. App. 101-102) is reported at 816 F.2d 1572. The opinions of the United States District Court for the Southern District of Florida (Pet. App. 1-52, 53-74) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1987. The judgment was modified on rehearing on June 1, 1987. The petition for a writ of certiorari was filed on August 31, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal government, as employer, became subject to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. (& Supp. III) 201 *et seq.*, in 1974. The FLSA generally provides that a covered employee must receive overtime pay for all hours of work in excess of 40 hours per week "at a rate not less than one and one-half times the regular rate at which he is employed" (29 U.S.C. 207(a)(1)).

In applying the FLSA to federal employees, Congress recognized that federal law enforcement officers had to be treated differently than other employees. A law enforcement officer may be "responsible for recognizing, without supervision, circumstances which require him to remain on duty" (5 U.S.C. 5545(c)(2)) and receives "administrative[1]y uncontrollable overtime pay" for such work.[1] The amount of administratively uncontrollable overtime pay is based on the average amount of time a law enforcement officer is expected to do such work; for example, an officer whose position "requires an average of over seven but not more than 9 hours a week" of administratively uncontrollable overtime receives additional pay at the rate of 20% of his "basic pay" (5 C.F.R. 550.154).[2] Thus, law enforcement officers do not receive administratively uncontrollable overtime pay based on how many hours of administratively uncontrollable overtime they actually work in a given pay period; rather, an officer receiving administratively uncontrollable overtime pay at the rate

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[1] Law enforcement officers must remain on duty outside normal work hours in order to "perform such duties as shadowing suspects, working incognito among those under suspicion, searching for evidence, meeting informers, making arrests, and interviewing persons having knowledge of criminal or alleged criminal activities" (5 C.F.R. 550.153).

[2] Basic pay is the amount paid to a federal employee under the General Schedule depending on his grade and step (see 5 U.S.C. (& Supp. IV) 5332).

of 20% receives it at that rate for a given pay period whether he worked 20, 10, or no hours of such overtime during the week. In recognition of the unique circumstances under which law enforcement officers work and are paid, the 1974 amendments to the FLSA enacted a special overtime pay provision, 29 U.S.C. 207(k), providing that law enforcement officers should receive FLSA overtime pay only for the hours they are on duty in excess of 240 hours in a 28-day period.[3]

Congress instructed the Civil Service Commission, the predecessor to the Office of Personnel Management (OPM), to apply the FLSA in the federal sector consistently with its application by the Department of Labor in other sectors. H.R. Rep. 93-913, 93d Cong., 2d Sess. 28 (1974). In January 1975, the Commission issued Federal Personnel Manual (FPM) Letter No. 551-5, which provided instructions for applying the FLSA to federal law enforcement officers. Because FLSA overtime pay is to be paid at the rate of one and one-half times the "regular rate of pay," it was necessary to establish a formula for computing that rate for law enforcement officers. The FLSA provides that the regular rate "include[s] all remuneration for employment paid to, or on behalf of, the employee" (29 U.S.C. 207(e)), with certain exceptions. The Commission, finding no exception applicable, instructed that law enforcement officers' regular rates of pay are their basic pay plus their administratively uncontrollable overtime pay during a pay period divided by the number of hours they are on duty during the pay period (FPM Letter No. 551-5, Attachment 2, at 5).

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[3] The 240-hour requirement was revised downward on a number of occasions. Congress ultimately directed the Secretary of Labor to determine the average number of hours worked by law enforcement officers and provided that law enforcement officers should receive FLSA overtime pay for hours worked in excess of that average number. The Secretary's study determined that they averaged 171 hours of work per 28-day period. 48 Fed. Reg. 40519 (1983). Accordingly, federal law enforcement officials now receive FLSA overtime pay for hours worked in excess of 171 in a 28-day period.

The Department of Justice's implementing regulations detailed how the FLSA applies to law enforcement officers who work administratively uncontrollable overtime. One example considered a GS-7, step 1, criminal investigator who received $5.31 per hour as his basic rate of pay in 1976 and received administratively uncontrollable overtime pay at the rate of 25%. Such an employee received basic pay of $424.80 and administratively uncontrollable overtime pay of $106.20, for a total of $531, during each two-week pay period. If that employee worked 125 hours during a particular two-week pay period, his regular rate of pay would be calculated as $4.25 ($531/125 hours) during that period. In 1976, law enforcement officers were entitled to overtime under Section 207(k) for hours worked in excess of 116 during a two-week pay period. Therefore, in the example, the employee would be entitled to nine hours of FLSA overtime pay (125 hours-116 hours). The overtime premium is calculated as one-half the regular rate[4] times the number of overtime hours worked; in the example, the employee would receive $19.13 as an FLSA overtime premium (1/2 x $4.25 x 9 hours) and a total of $550.13 ($531 + $19.13) for the pay period. Appellants' C.A. Br. App. 144-147.

2. This case involves a class of 35 deputy United States marshals. They were eligible for FLSA overtime premiums in addition to administratively uncontrollable overtime pay from

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[4] The Commission explained: "The employee's additional compensation for overtime work is computed at *one-half* times the 'regular rate' and not *one and one-half* times the 'regular rate' for all overtime hours under the FLSA. A simple explanation is that in computing an employee's total remuneration for the work period, the employee has already been compensated at 100 percent for all hours in his tour of duty. Therefore, once the employee's 'regular rate' is computed, the employee is then entitled to additional compensation of 50 percent times his 'regular rate' for those hours in excess of the maximum hours limitation of [29 U.S.C. 207(k)]. This method of computing an employee's overtime entitlement under the FLSA results in the employee being compensated for overtime work at a rate of 'one and one-half times the regular rate at which he is employed.' " FPM Letter No. 551-5, Attachment 2, at 5 (emphasis in original).

January 1, 1975, when the FLSA became applicable to them (Pet. App. 85), through October 21, 1978, when the Department of Justice stopped paying administratively uncontrollable overtime pay to deputy United States marshals (*id.* at 83 n.4).[5] Petitioners contended that the Commission improperly determined how the regular rate of pay is to be calculated in cases involving administratively uncontrollable overtime pay. In petitioners' view, both the hours of administratively uncontrollable overtime and the pay received for that work should be excluded from the regular rate calculation.

The district court agreed with petitioners (Pet. App. 20-21). The court relied primarily on 29 U.S.C. 207(e)(5), which provides that the regular rate does not include "extra compensation provided by a premium rate paid for certain hours worked by the employee in any day o[r] workweek because such hours are worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee." When recalculated in accordance with the district court's method, the total amount of additional pay due to the 35 plaintiffs for the 34-month period was less than $5,000; they were awarded double that amount pursuant to 29 U.S.C. 216(b) (Pet. App. 79).

The court of appeals reversed the district court's decision that the Commission improperly determined how to treat administratively uncontrollable overtime pay in determining a law enforcement officer's regular rate of pay (Pet. App. 93-95). The court held that administratively uncontrollable overtime pay is not within the Section 207(e)(5) exception for "extra compensation provided by a premium *rate* paid for *certain hours*

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[5] Petitioners' primary dispute concerned whether certain work that they performed was properly classified as administratively uncontrollable overtime as opposed to regularly scheduled overtime, for which they are entitled to compensation under 5 U.S.C. (& Supp. IV) 5542. The district court awarded them more than $200,000 with respect to that claim (Pet. App. 75-76), and the court of appeals affirmed (Pet. App. 88-93); that award is not at issue.

worked,'' for two reasons (emphasis added). The court noted that administratively uncontrollable overtime pay ''is a flat percentage of the employee's basic pay which remains fixed regardless of the number of [administratively uncontrollable overtime] hours worked in a particular pay period'' and concluded that ''it is not paid for 'certain hours' '' and that ''it is not paid at any hourly 'rate' '' (Pet. App. 94-95).

ARGUMENT

The decision of the court below is consistent with the terms of the federal statute and the relevant decisions of this Court and the other courts of appeals. Accordingly, review by this Court is not warranted.

1. For the reasons stated by the court of appeals, the formula established in FPM Letter No. 551-5 for computing the regular rate of pay of federal law enforcement officials receiving administratively uncontrollable overtime pay is consistent with the terms of the FLSA. Under 29 U.S.C. 207(e), ''the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment'' with specified exceptions. The only arguably relevant exception is the exception in Section 207(e)(5) for ''a premium rate paid for certain hours worked'' in excess of normal working hours. As the court of appeals explained (Pet. App. 94-95), administratively uncontrollable overtime pay is neither paid at a ''rate'' nor paid for ''certain hours'' worked.

The relevant regulations of the Department of Labor confirm that reading of the statute. Those regulations provide that ''[t]o qualify as an overtime premium under [29 U.S.C. 207(e)(5)], the extra compensation for overtime hours must be paid pursuant to a premium rate which is * * * a rate per hour'' (29 C.F.R. 778.308(a)), and that ''where extra compensation is paid in the form of a lump sum for work performed

in overtime hours, it must be included in the regular rate'' (29 C.F.R. 778.310). Administratively uncontrollable overtime pay is not paid as a rate per hour, but is paid as a lump sum without regard to the actual number of overtime hours a law enforcement officer worked in the pay period. Accordingly, exclusion of administratively uncontrollable overtime pay from the regular rate calculation would conflict with the requirements of the statute, both on its face and as interpreted by the Department of Labor.

In any event, the calculation method set forth in FPM Letter No. 551-5 warrants deference as ''a contemporaneous consruction of [an] Act by the officials charged with the responsibility of setting its machinery in motion'' (*Chemehuevi Tribe of Indians* v. *FPC*, 420 U.S. 395, 409-410 (1975); accord, *United States* v. *Clark*, 454 U.S. 555, 565 (1982) (concerning the validity of a regulation interpreting a federal pay statute). FPM Letter No. 551-5 is a comprehensive document, covering all aspects of the entitlements of federal law enforcement officers to overtime pay under the FLSA, that was issued at virtually the same time those employees became subject to the FLSA. The Comptroller General approved the method of determining the regular rate established by FPM Letter No. 551-5 shortly after the FLSA became applicable to federal employees. *Overtime Compensation of Firefighters Under Fair Labor Standards Act*, 55 Comp. Gen. 908 (1976). As the Federal Circuit recognized, in a case involving FPM Letter No. 551-5's treatment of federal firefighters, the other group covered by Section 207(k): ''By promulgating the guidelines at issue in this case, OPM has met the challenge given it by Congress. It has administered the FLSA in a most difficult situation and has done so consistent with the Secretary of Labor's regulations.'' *Zumerling* v. *Devine*, 769 F.2d 745, 753 (1985).

2. The decision below is consistent with all the relevant decisions of this Court and the courts of appeals. After the district court issued its decision in this case, the Federal Circuit upheld the Commission's method of calculating the overtime pay due federal firefighters set forth in FPM Letter No. 551-5 in *Zumerling*.[6] The court in *Alexander* v. *United States*, 1 Cl. Ct. 653 (1983), previously had held that administratively uncontrollable overtime pay should not be excluded in calculating the regular rate of pay for law enforcement officials. And the court in *Beebe* v. *United States*, 640 F.2d 1283 (Ct. Cl. 1981), had held that agencies could properly rely on FPM Letter No. 551-5. No court, other than the district court here, has ruled that OPM's predecessor erred in its treatment in FPM Letter No. 551-5 of either group covered by Section 207(k).

Contrary to petitioners' contention (Pet. 10-11), the court of appeals' decision does not conflict with this Court's statement that "the regular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed." *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945). While that statement accurately describes how the regular rate is calculated for employees who work 40 hours per week at a particular rate per hour, the Court has recognized that the regular rate must be calculated differently for other employees. Thus, for employees working on a piece-work basis, the Court held that the regular rate is "the quotient of the amount received during the week divided by the number of hours worked" (*id.* at 424). Similarly, in *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 580 n.16 (1942), the Court considered the regular rate

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[6] The Federal Circuit followed *Zumerling* in its unpublished opinion in *Wheeler* v. *United States*, No. 86-1043 (Sept. 18, 1986), and this Court denied a petition for a writ of certiorari in *Wheeler* on March 9, 1987 (No. 86-1000).

calculation for an employee who worked a varying workweek for a fixed wage, concluding that "[w]age divided by hours equals regular rate." The Court noted that, under that formula, "the longer the hours, the less the rate and the pay per hour" (*id.* at 580), but held that the FLSA mandates calculation of the regular rate in that manner.

The formula at issue instructs federal agencies to compute law enforcement officers' regular rates in exactly the same manner as that approved in *Missel*. Law enforcement officers, like the employee in *Missel*, work a varying workweek (depending on how much administratively uncontrollable overtime they work) for a fixed wage (the sum of their basic pay plus their administratively uncontrollable overtime pay). The "anomaly" cited by petitioners (Pet. 15)—that their regular rate declines the more hours they work—is not inconsistent with this Court's decisions, but, rather, is consistent with the manner in which the FLSA has been interpreted since its enactment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DAVID M. COHEN
ROBERT A. REUTERSHAN
Attorneys

NOVEMBER 1987